Supreme Court, U.S.
FILED

06-88 JUL 17 2006

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In the Supreme Court of the United States

BAYER CORPORATION AND WYETH,
Petitioners,

v.

JAMES E. ANDERSON, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether plaintiffs asserting claims only against diverse defendants can defeat a defendant's right to remove, based on diversity jurisdiction, by improperly joining (a) plaintiffs asserting claims against non-diverse defendants, and (b) non-diverse defendants against whom they assert no claims?

PARTIES TO THE PROCEEDING

The parties to the proceeding in this Court are as follows:

Bayer Corporation and Wyeth, *Petitioners*

James E. Anderson, James Anderson, Jr., John R. Anderson, Jack Archer, Dorothy Bailey Banks, Louis Bailey and Barbara Bailey, Sheila Barkley, Kathy Bradham, Eddie Butler, Ethel Carter, Ernestine Dale and M.J. Dale, Elizabeth Elmore, Daisy Harris, Leeida Henard, Robert Hendry, Dollas Jacob and Eugene Jacob, Ollie L. King, William C. Magee and Rosie Magee, Belain Merrick, Glenn Maier and Paula Maier, Sharon Twyner McKinney, Valerie Mitchell, Melanie Netterville and Charles Netterville, Veronica Nickelson, Elizabeth Pritchard, Edward Schuette, Levi Smith, Sr. and Marjorie Smith, Willie Thompson and Mae Thompson, Alfanette Vaughn, Della Warren, Lois Washington, Shawanda Washington, Charles Welch, Patricia Wells, Martha Wicks, Nathaniel Williams and Bobbie Williams, Roger Dale Wilson and Wilma Diane Wilson, Delores Woods, Robert Green, Lillian Pace, Joy Pickering and Judd Pickering, James Lang and Mildred Marshall, *Respondents*

The parties to the proceeding in the court whose judgment is sought to be reviewed are as follows:

Bayer Corporation, Wyeth, GlaxoSmithKline Consumer Healthcare, L.P., SmithKline Beecham Corporation d/b/a GlaxosmithKline, Block Drug Co., Inc., Block Drug Corporation, Bristol Myers Squibb, Procter & Gamble Pharmaceuticals, Inc., Novartis Consumer Health, Inc. and

Novartis Pharmaceuticals Corporation[1], McNeil-PPC, Inc., Wal-Mart Stores, Amerisource Bergan, Rite-Aid, Walco Oil, Super D Drugs Acquisition, Wal-Mart Stores East, Liberty Drug Store, and K & B Services, Inc., *Appellees*

All Respondents here are Appellants below.

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[1] In the Appellees' Brief in the court below Novartis Consumer Health, Inc. and Novartis Pharmaceuticals Corporation stated: "Neither Novartis Consumer Health, Inc. ("NCH") nor Novartis Pharmaceuticals Corporation ("NPC") were named as defendants in the original multiple-plaintiff *Anderson et al. v. Bayer Corp et al.* action. LilAnn Pace, one of the plaintiffs in that action, attempted to add NCH as a new defendant in her individual action, which was not authorized by CMO 15, other order of the District court or stipulation by the parties to that case. Further, neither NCH nor NPC were ever served with Ms. Pace's unauthorized individual complaint. Although NCH and NPC may be listed on certificates of service in this appeal and/or noted as appellees on this appeal's docket sheet, neither NCH nor NPC have been named in the caption of the Anderson appeal (04-35875). Therefore, NCH's and NPC's joinder in this brief should not be construed as an appearance or waiver of its rights, objections, or defenses, including, and without limitation, insufficiency of process, insufficiency of service of process and personal jurisdiction."

STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Petitioner Bayer Corporation:

Petitioner Bayer Corporation is a wholly owned subsidiary of Bayer AG, a publicly held German company.

Petitioner Wyeth f/k/a American Home Products:

Petitioner Wyeth is a publicly traded company. Wyeth does not have any parent corporations and no publicly held company owns ten percent (10%) or more of its outstanding shares.

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Petitioners Bayer Corporation and Wyeth respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Memorandum of the United States Court of Appeals for the Ninth Circuit dated March 13, 2006, reversing the decision of the district court, appears at Pet. App. A at 1a and is unpublished.

The Opinion of the United States District Court for the Western District of Washington, dismissing the action, appears at Pet. App. B at 19a and is unpublished. The Opinion of the United States District Court for the Western District of Washington, denying Plaintiffs' Motion to Remand, appears at Pet. App. C at 26a and is unpublished.

JURISDICTION

The order of the United States court of appeals sought to be reviewed was entered on March 13, 2006. A timely petition for panel rehearing and for rehearing en banc was denied on April 20, 2006 (Pet. App. D at 32a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are 28 U.S.C. §§ 1332 (a) (1), (c) (1), 1441 (a), (b), 1446 (a), (b), (d), and 1447 (c), (d), which appear at Pet. App. E at 34a.

Section 1332 (a) (1) provides in relevant part: "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—(1) citizens of different states . . . ."

Section 1441 (a) provides in relevant part: "Except as otherwise provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending." Section 1441 (b) provides in relevant part: "Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought."

STATEMENT OF THE CASE

This case presents an important question regarding plaintiffs' ability to destroy diversity jurisdiction under 28 U.S.C. § 1332 and defeat removal under 28 U.S.C. § 1441. The Ninth Circuit's interpretation of fraudulent misjoinder wrongly restricts defendants' right to remove an action to federal court. Under the Ninth Circuit's decision, plaintiffs with claims solely against diverse defendants can avoid federal diversity jurisdiction by improperly joining other plaintiffs who allege claims against non-diverse defendants, even though the plaintiffs have no connection with each other.

In this mass tort product liability action, 58 Mississippi citizens (47 users of products containing phenylpropanolamine ("PPA") and 11 spouses), jointly filed a complaint in Mississippi state court against 16 manufacturers and 13

retailers of various PPA-containing products. All defendants were diverse to the Mississippi plaintiffs except for four retailer defendants. Of the 58 plaintiffs, only nine asserted a claim against a non-diverse retailer defendant. The remaining 49 plaintiffs were diverse from the manufacturer(s) and any retailer against whom they asserted claims.[2] None of the plaintiffs alleged any connection with any other plaintiff (except spouses).

Under 28 U.S.C. §§ 1332 and 1441, Defendant Bayer Corporation ("Bayer") removed the state court action to the United States District Court for the Southern District of Mississippi based on the federal court's diversity jurisdiction. In its removal notice, Bayer alleged fraudulent joinder of the four non-diverse retailer defendants and improper joinder of parties. Specifically, Bayer alleged that plaintiffs who alleged claims solely against diverse manufacturing defendants were improperly joined with plaintiffs alleging claims against non-diverse retailer defendants. Further, Bayer alleged that the non-diverse retailer defendants were fraudulently and improperly joined because a number of plaintiffs did not assert a claim against a non-diverse defendant. Pet. App. F at 48a.

Plaintiffs moved for remand, or alternatively, for severance and remand of the claims of plaintiffs who asserted claims against a non-diverse defendant. The action was subsequently transferred to a multi-district litigation proceeding in the United States District Court for the Western District of Washington ("MDL Court").

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[2] Citizenship of defendants sued under fictitious names is disregarded. 28 U.S.C. § 1441 (a).

Prior to the transfer of this action to the MDL Court, the MDL Court determined that in the PPA multi-district litigation all plaintiffs in multi-plaintiff actions were improperly joined under Fed. R. Civ. P. 20 because the multi-plaintiff cases did not seek relief arising from the same transaction or occurrence. Thus, the MDL Court issued Case Management Order 15 ("CMO") holding that severance was proper and ordering plaintiffs in multi-plaintiff actions to file individual complaints. The CMO required all newly docketed multi-plaintiff complaints to file severed complaints within 30 days of being docketed in the MDL.

Following the transfer of this action to the MDL, plaintiffs renewed their motion for remand. Bayer opposed the motion because of the fraudulent joinder of non-diverse retailer defendants, citing the MDL Court's orders denying remand in ten similar actions. The MDL Court agreed with Bayer and denied plaintiffs' motion for remand, holding that the non-diverse defendants were fraudulently joined because plaintiffs had failed to state a cause of action against them. Accordingly, complete diversity existed among the parties. The MDL Court did not discuss the issue of improper joinder of the plaintiffs and of non-diverse defendants.

When plaintiffs failed to timely comply with CMO 15, their multi-plaintiff action and late-filed individual actions were dismissed. Fifty-four of the 58 plaintiffs appealed to the United States Court of Appeals for the Ninth Circuit. On appeal, plaintiffs raised two issues: (1) whether the MDL Court lacked subject matter jurisdiction over their claims, and (2) whether the MDL Court abused its discretion in dismissing their claims. Defendants maintained that the MDL Court properly held that federal diversity jurisdiction existed because the non-diverse retailer defendants were fraudulently joined. Further, defendants explained that the MDL Court's

determination in CMO 15 that plaintiffs in multi-plaintiff actions – such as this one – were improperly joined was not in dispute. Therefore, because of plaintiffs' improper joinder, the jurisdictional issue only affected the eight plaintiffs-appellants who asserted claims against non-diverse defendants and not the remaining 46 plaintiffs-appellants.[3]

The United States Court of Appeals for the Ninth Circuit reversed and remanded with instructions to vacate the dismissals and remand the entire action to Mississippi state court "in the form it was at the time of removal." Thus, the instructions included remanding plaintiffs who had not appealed the dismissal of their claims. The Ninth Circuit held that the MDL Court lacked jurisdiction because the non-diverse defendants were not fraudulently joined and complete diversity did not exist. The Ninth Circuit also rejected the defendants' improper joinder argument by stating: "No basis appears in the record or in our case law for severing the claims of the eight plaintiffs who have named non-diverse defendants."

Defendants-appellees filed a Petition for Rehearing explaining that: (1) Bayer's Notice of Removal raised the improper joinder issue; (2) Plantiffs' Motion to Remand addressed the improper joinder issue; and (3) plaintiffs never objected to CMO 15, which determined that plaintiffs in PPA multi-plaintiff actions were improperly joined. The Ninth Circuit denied the Petition for Rehearing.

The Ninth Circuit denied Petitioner Bayer's motion for stay or recall of mandate, which sought stay of execution and

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[3] One of the plaintiffs asserting claims against a non-diverse defendant did not appeal.

enforcement of the judgment, or recall and stay of the mandate, pursuant to 28 U.S.C. § 2101(f) and FRAP 41.[4] On July 14, 2006, Petitioners filed in this Court an application for stay of judgment pending this Court's review. This Court has jurisdiction to review the Ninth Circuit's decision, notwithstanding that the court of appeals' mandate has issued and the case has been remanded to state court. *Aetna Cas. & Sur. Co. v. Flowers*, 330 U.S. 464, 466-67 (1947) (construing predecessor statute to 28 U.S.C. § 1447(d)).

REASONS FOR GRANTING THE PETITION

This case presents an important issue of federal law on which the Circuits are split. Under the Ninth Circuit's rationale, plaintiffs whose claims would otherwise be removable may destroy a defendant's right to remove by the expedient of improper joinder. Any number of plaintiffs asserting claims only against diverse defendants may defeat removal simply by improperly joining with a single plaintiff asserting a claim against a non-diverse defendant. The Ninth Circuit would ignore that the claims do not arise from the same transaction or occurrence and that there is improper joinder of plaintiffs and of defendants. The Ninth Circuit's decision directly conflicts with the Eleventh and Fifth Circuits' decisions that such misjoinder is no less "fraudulent" than fraudulent joinder, which this Court long ago held may not defeat a defendant's right to a federal forum.

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[4] On Bayer's motion, the MDL Court stayed the remand pending the Ninth Circuit's ruling on Bayer's motion for stay or recall of mandate. In its order, the MDL Court incorrectly stated that the defendants did not raise the improper joinder issue.

The Court should resolve this important jurisdictional issue, which affects defendants' fundamental right to removal. To allow the Ninth Circuit's decision to stand would encourage plaintiffs in future cases, especially in "mass tort" cases, to improperly join their claims to avoid federal jurisdiction. The issue is far from an isolated one, having arisen in numerous district courts, scattered throughout the Circuits, with differing results. Congress granted defendants the right to have disputes resolved in a federal court where the citizenship of the parties is diverse. A uniform rule is needed to preserve that important statutory right.

I. THE NINTH CIRCUIT'S DECISION DIRECTLY CONFLICTS WITH OTHER CIRCUITS' DECISIONS.

The Ninth Circuit's decision directly conflicts with decisions of both the Fifth Circuit and the Eleventh Circuit, the only other Circuits that have addressed the issue. *See, e.g., In re Benjamin Moore & Co.*, 309 F.3d 296, 298 (first petition for mandamus), 318 F.3d 626, 630 (5th Cir. 2002) (second petition for mandamus); *Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353 (11th Cir. 1996), *abrogated on other grounds by Cohen v. Office Depot, Inc.*, 204 F.3d 1069, 1072-75 (11th Cir. 2000).

In *Tapscott*, 77 F.3d at 1355, 1360, plaintiffs who sued diverse and non-diverse defendants alleging fraud from the sale of automobile service contracts ("the automobile class") joined with plaintiffs who sued only diverse defendants alleging fraud from the sale of retail products service contracts ("the merchant class"). A diverse defendant as to the merchant class claims removed. The district court held that the defendants were improperly joined. Thus, the district court disregarded the citizenship of the improperly joined

parties, asserted jurisdiction, and severed and remanded the remainder of the action. *Id.*

The Eleventh Circuit rejected Appellants' argument that a "misjoinder, no matter how egregious, is not fraudulent joinder," and affirmed. *Id.* The court explained:

> Misjoinder may be just as fraudulent as the joinder of a resident defendant against whom a plaintiff has no possibility of a cause of action. A defendant's "right of removal cannot be defeated by a fraudulent joinder of a resident defendant having no real connection with the controversy." *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97, 42 S. Ct. 35, 37, 66 L. Ed. 144 (1921).

Id. Finding there was "no real connection" between the automobile class non-diverse defendant and the merchant class controversy, the Eleventh Circuit held that the joinder attempted in the case before it was so "egregious" that it constituted fraudulent joinder. *Id.* Accordingly, it severed the claims of the automobile class (who asserted claims against a non-diverse defendant) from those of the merchant class (who asserted claims only against diverse defendants) and remanded only the former. *Id.*

The Eleventh Circuit has applied the fraudulent misjoinder rule once since *Tapscott*, but held in that case that there was no fraudulent misjoinder. *Triggs v. John Crump Toyota, Inc.*, 154 F.3d 1284, 1287-90 (11th Cir. 1998). A plaintiff brought a class action against a diverse defendant and a non-diverse defendant, alleging a fraudulent leasing scheme. Applying the rule that only the citizenship of the named parties is considered, the court of appeals held the non-diverse defendant was not fraudulently joined. It found that, unlike

in *Tapscott*, where there were two distinct classes of plaintiffs that had no connection, there was only one class of plaintiffs, seeking joint liability, in the class action before it. *Id.* at 1289-90.

The Fifth Circuit has approved the fraudulent misjoinder doctrine, though it has not applied it. *In re Benjamin Moore & Co.*, 309 F.3d 296, 298 (first petition for mandamus), 318 F.3d 626, 630 (5th Cir. 2002) (second petition for mandamus). Seventeen unrelated plaintiffs brought a lead paint product liability action against diverse manufacturers and distributors and non-diverse retailers. Defendants removed on fraudulent joinder and misjoinder grounds, alleging that only four plaintiffs asserted claims that related to a non-diverse defendant. The district court granted remand, refusing to consider the defendants' fraudulent misjoinder argument. *Id.* at 309; *Id.* at 629. The Fifth Circuit denied defendants' petition for writ of mandamus, but, citing *Tapscott*, pointed out that the district court should have considered whether misjoinder of plaintiffs should have been allowed to defeat diversity jurisdiction as to the other 13 plaintiffs' claims.

After the district court reconsidered but rejected fraudulent misjoinder, defendants again petitioned for mandamus, asking the Fifth Circuit to sever and remand only the claims of plaintiffs who asserted a claim against a non-diverse retailer. The Fifth Circuit dismissed the appeal because it lacked jurisdiction to review a remand order, but stated, "[W]ithout detracting from the force of the *Tapscott* principle that fraudulent misjoinder of plaintiffs is no more permissible than fraudulent misjoinder of defendants to circumvent diversity jurisdiction, we do not reach its application in this case." *Id.* at 630-31.

The Ninth Circuit's decision in this case created a split in the Circuits. The Ninth Circuit rejected the fraudulent misjoinder doctrine on essentially similar facts as in *Tapscott* and *Benjamin Moore*. In this case, each plaintiff asserted an individual claim against a manufacturer, and in some claims, against a retailer of a PPA-containing product. Under Mississippi law, the plaintiffs were improperly joined. *Purdue Pharma, L.P. v. Estate of Heffner*, 904 So. 2d 100, 103 (Miss. 2004) (mere taking of same drug does not satisfy Miss. R. Civ. P. 20 joinder requirements; plaintiffs' claims in pharmaceutical product liability action severed). The district court had already held in the PPA MDL proceeding that plaintiffs in multi-plaintiff cases were improperly joined under Fed. R. Civ. P. 20. The plaintiffs did not contest that Order or its application to them.

Despite the clear improper joinder, the court of appeals refused to sever and remand only the plaintiffs who asserted claims against a non-diverse defendant. Instead, it allowed the 49 plaintiffs – whose claims would have been removable but for joinder with the nine plaintiffs who asserted claims against a non-diverse defendant – to defeat the defendants' right to remove their claims by the artifice of improper joinder.

On similar facts, *Tapscott* and *Benjamin Moore* reached conclusions opposite from the Ninth Circuit's. In all three cases each plaintiff's (or each class of plaintiffs') claims had "no real connection" with any other plaintiff's (or class of plaintiffs') claims. And there was no connection between the non-diverse defendant(s) against whom some plaintiffs asserted claims and the controversies of other plaintiffs who asserted claims against diverse defendants only. The Eleventh and Fifth Circuits preclude plaintiffs who assert claims only against diverse defendants from defeating removal by

improperly joining with a plaintiff who asserts a claim against a non-diverse defendant. In contrast, the Ninth Circuit permits such plaintiffs to circumvent diversity jurisdiction.

Notably, in a previous unreported decision, the Ninth Circuit assumed without deciding that the Circuit would adopt the *Tapscott* fraudulent misjoinder doctrine, and applied it, but held that the joinder of plaintiffs "was not so improper as to be considered egregious." *Cal. Dump Truck Owners Ass'n v. Cummins Engine Co., Inc.*, 24 Fed. Appx. 727, 730 (9th Cir. 2001). Here, it flatly rejected the doctrine.

II. THE COURT SHOULD SETTLE THIS IMPORTANT QUESTION OF FEDERAL JURISDICTION.

"Federal courts may, and should, take such action as will defeat attempts to wrongfully deprive parties entitled to sue in the Federal courts of the protection of their rights in those tribunals." *Ala. Great S. Ry. Co. v. Thompson*, 200 U.S. 206, 218 (1906). Therefore, this Court created the fraudulent joinder exception to the rule that complete diversity is required to satisfy diversity jurisdiction. This Court instructed, "Federal courts should not sanction devices intended to prevent a removal" and "should be equally vigilant to protect the right to proceed in the Federal court as to permit the state courts, in proper cases, to retain their own jurisdiction." *Wecker v. Nat'l Enamel & Stamping Co.*, 204 U.S. 176, 184 (1907).

In accord with these decisions, the right of removal cannot be defeated by the "device[]" of joining a non-diverse defendant "having no real connection with the controversy." *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97 (1921). Yet exactly that – and more – happened here. Fifty-eight

improperly joined plaintiffs joined a few non-diverse defendants who had no connection whatsoever with the vast majority of the plaintiffs' individual controversies. Such a device is no less fraudulent because a few of the improperly joined plaintiffs asserted a claim against one of the non-diverse defendants. Rather, it is a complete sham as to the numerous plaintiffs who asserted claims against diverse defendants only, and whose claims, but for the device of improper joinder, were removable.

Petitioners seek review of the Ninth Circuit's decision because it presents an important question of federal jurisdictional law that should be settled: whether a defendant's statutorily guaranteed right to a federal forum may be taken away by the procedural contrivance of improper joinder, as occurred below. The question goes far beyond the parties to this proceeding, however, prejudicing all defendants in cases removable but for improper joinder of parties.

The issue often occurs in "mass tort" cases where numerous plaintiffs improperly join their claims and attempt to ride the diversity-destroying coat-tails of one or a few plaintiffs who assert a claim against a non-diverse defendant. Indeed, under the Ninth Circuit's rationale, there is no limit to the number of plaintiffs who could escape federal court by such a device. In many cases, as here, permitting plaintiffs to improperly keep their claims out of federal court has a further adverse consequence: it deprives defendants of their right to a multidistrict litigation proceeding – that follows from federal jurisdiction – and takes away the efficiencies and uniformity that result from coordinated pretrial proceedings.

The circumstances of the instant case demonstrate that a uniform rule is needed. The case was properly removed to a district court in the Fifth Circuit, which has approved the

fraudulent misjoinder doctrine. If it had remained there, the district court should have severed and remanded only the claims of any plaintiffs who asserted a claim against a non-fraudulently joined non-diverse defendant. Instead, it was transferred to an MDL proceeding in a district court in the Ninth Circuit, where that court of appeals rejected the doctrine and ordered all plaintiffs remanded to Mississippi state court.

Plaintiffs who have committed improper joinder in an attempt to defeat removal should not be heard to argue that the defendant can regain its right of removal – a right improperly taken away by the sharp procedural practices of plaintiffs – by seeking severance in the state court. Imposing this burden on the defendant could result in forfeiture of the defendant's statutorily guaranteed removal right. First, there is disagreement among the district courts whether state or federal rules should apply to the fraudulent misjoinder issue in federal court. If federal rules apply, and if state court rules would not permit severance in a given case while federal rules would permit it, then the defendant would lose its removal right. Second, even if severance could be obtained in state court, removal could be precluded by the one year limit on diversity jurisdiction removal, 28 U.S.C. § 1446 (b), depending on how long it took to obtain severance. Third, removal after severance could be precluded by the voluntary-involuntary rule, which permits removal of an initially non-removable case only if a voluntary act of the plaintiff makes it removable.

The importance of the fraudulent misjoinder issue is demonstrated by the disarray among the 20 or more district courts, including courts in most of the Circuits, that have considered the issue in over 45 decisions, often without guidance from their court of appeals. Many district courts

have adopted and applied the doctrine in one form or another, though disagreeing on whether misjoinder must be "egregious" to be fraudulent, whether state or federal rules of joinder should govern, and whether the proper response is dismissal or severance and remand of plaintiffs over whose claims it lacks jurisdiction. For example:

> Second Circuit. *In re Rezulin Prods. Liab. Litig.*, 168 F. Supp. 2d 136, 147-48 (S.D.N.Y. 2001) (rejecting *Tapscott's* "egregiousness" standard but finding misjoinder of plaintiffs, and severing and remanding plaintiff with diversity-destroying claim "for purposes of maintaining the defendants' right to removal of the remainder of the action").
>
> Third Circuit. *In re Diet Drugs Prods. Liab. Litig.*, 294 F. Supp. 2d 667, 673, 678 (E.D. Pa. 2003) (following *Tapscott* and finding egregious and fraudulent misjoinder of plaintiffs, and dismissing plaintiffs with diversity-destroying claims).
>
> Fourth Circuit. *Grennell v. Western S. Life Ins. Co.*, 298 F. Supp. 2d 390, 395-400 (S.D.W. Va. 2004) (adopting *Rezulin* court's reasoning, finding fraudulent joinder of 2,200 plaintiffs and of non-diverse defendants against whom many plaintiffs had no claim, and holding that the proper remedy was severance rather than dismissal; "The Court can see no logic in prohibiting plaintiffs from defeating diversity jurisdiction by fraudulently joining nondiverse defendants, but allowing them to do so through fraudulently joining nondiverse plaintiffs"); *Ashworth v. Albers Med., Inc.*, 395 F. Supp. 2d 395, 410-13 (S.D.W. Va. 2005) (finding a plaintiff fraudulently misjoined a non-diverse defendant against

whom it asserted a "legally and factually ... remote" claim, and severing and remanding that claim).

Fifth Circuit. *Reed v. American Med. Sec. Group, Inc.*, 324 F. Supp. 2d 798, 803-05 (S.D. Miss. 2004) (severing and remanding claims of fraudulently misjoined plaintiffs; "The premise which underlies the concept of fraudulent misjoinder is that diverse defendants ought not be deprived of their right to a federal forum by such a contrivance as this"); *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563, 648-54 (S.D. Tex. 2005) (finding "egregious" misjoinder of plaintiffs, but remanding because all plaintiffs asserted claims against a non-diverse defendant; *Barron v. Miraglia*, 2004 WL 1933225, at *2 (N.D. Tex. Aug. 30, 2004) (unreported) (holding that fraudulent misjoinder must be "totally unsupported or egregious" and finding no fraudulent misjoinder).

Sixth Circuit. *Asher v. Minnesota Mining and Mfg. Co.*, 2005 WL 1593941, at *5-8 (E.D. Ky. June 30, 2005) (unreported) (adopting doctrine but recognizing that standards are not clear, including applicability of "egregious" or simple misjoinder standard and of federal or state joinder rules; finding misjoinder and ordering discovery to determine which plaintiffs asserted a claim against a non-diverse retailer, so that court could sever and remand such claims).

Seventh Circuit. *In re Bridgestone/Firestone, Inc.*, 260 F. Supp. 2d 722, 727-31 (S.D. Ind. 2003) (defining fraudulent misjoinder as joining of claims without sufficient factual nexus to satisfy the permissive joinder standard, and finding no fraudulent misjoinder).

Eighth Circuit. *In re Baycol Prods. Liab. Litig.*, 2003 WL 22341303, at *3-4 (D. Minn. 2003) (unreported) (adopting doctrine, finding fraudulent misjoinder, and severing and remanding the claim of the only plaintiff who asserted a claim against a non-diverse defendant); *In re Prempro Prods. Liab. Litig.*, 417 F. Supp. 2d 1058, 1060 (E.D. Ark. 2006) (finding fraudulent misjoinder and dropping non-diverse plaintiffs without prejudice to re-filing; noting that in MDL litigation, "the non-diverse plaintiff is typically misjoined for the purpose of defeating diversity").

Ninth Circuit. *Greene v. Wyeth*, 344 F. Supp. 2d 674, 683-85 (D. Nev. 2004) (adopting doctrine but rejecting "egregiousness" standard in favor of severance where joinder "is procedurally inappropriate and accomplishes no other objective than the manipulation of the forum"; finding improper joinder and severing and remanding claims of plaintiffs who asserted a claim against a non-diverse defendant); *see also Brazina v. Paul Revere Ins. Co.*, 271 F. Supp. 2d 1163, 1172 (N.D. Cal. 2003) (holding that if the court were to apply *Tapscott*, it would not find "egregious" misjoinder where plaintiff's claims had "enough of a connection").

Eleventh Circuit. *Rudder v. K Mart Corp.*, 1997 WL 907916, at *5-6 (S.D. Ala. Oct. 15, 1997) (unreported) (finding fraudulent misjoinder of plaintiffs where joinder was a "sham" and "collusive").

Other district courts have rejected the improper joinder (fraudulent misjoinder) doctrine. *See, e.g., Osborn v. Metro. Life Ins. Co.*, 341 F. Supp. 2d 1123, 1127 (E.D. Cal. 2004)

(rejecting doctrine because it would introduce procedural complexity and because of "uncertainty as to how such a theory should be applied"); *Rutherford v. Merck & Co.*, 2006 WL 1064971, at *7-11 (S.D. Ill. April 21, 2006) (unreported) (rejecting doctrine because "[n]othing in the jurisprudence of the Supreme Court of the United States regarding fraudulent joinder suggests that the joinder of non-fraudulent claims is a question that implicates the subject matter jurisdiction of a federal court" and because of policy favoring "simple, easy-to-apply jurisdictional rules," noting "enormous judicial confusion engendered by the doctrine" and predicting that "no clear standards for the application of the *Tapscott* doctrine" will emerge).

The importance of the doctrine has been noted by the commentators. Authors of a leading federal procedure text refer to it as procedural misjoinder and have stated that it may represent a third type of fraudulent joinder (in addition to outright fraud in pleadings, and lack of claim against a joined party). *See* 14B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3723 (3d ed. 1998) ("[a] new concept ... appears to be part of the doctrine of fraudulent joinder [and] has begun to emerge in the case law ...."); *see also* E. Farish Percy, *Defining the Contours of the Emerging Fraudulent Misjoinder Doctrine*, 29 Harv. J.L. & Pub. Pol'y 569, 570, 574 (2006) (advocating doctrine; noting "the current lack of clarity and uniformity concerning the doctrine's application"); Laura Hines and Steven Gensler, *Driving Misjoinder: The Improper Party Problem in Removal Jurisdiction*, 57 Ala. L. Rev. 779, 783 (2006) (advocating doctrine; noting the "muddled" state of fraudulent misjoinder case law).

Petitioners respectfully submit that this Court should provide guidance to the lower courts on this important – and

wrongly decided – question of federal subject matter jurisdiction. Like fraudulent joinder, fraudulent misjoinder is an "attempt[] to wrongfully deprive parties entitled to sue in the Federal courts of the protection of their rights in those tribunals." *See Thompson*, 200 U.S. at 218. This Court's precedent teaches that such "devices" should not be sanctioned. The Court should grant certiorari review to avoid a substantial erosion of the important jurisdictional principle of fraudulent joinder.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 04-35875

[Filed March 13, 2006]

In re: PHENYLPROPANOLAMINE (PPA) PRODUCTS LIABILITY LITIGATION, This appeal relates to the cases listed in Exhibit A,	)
JAMES E. ANDERSON; et al.,	)
Plaintiffs - Appellants,	)
v.	)
BAYER CORPORATION; et al.,	)
Defendants - Appellees.	)

Appeal from the Untied States District Court
for the Western District of Washington
Barbara Jacobs Rothstein, District Judge, Presiding
D.C. No. MD-01-01407-BJR

Argued and Submitted February 7, 2006
Seattle, Washington

Before: D.W. NELSON, RYMER, and FISHER, Circuit Judges.

MEMORANDUM*

(This memorandum applies to the parties listed in Exhibit A)

James E. Anderson, et al. appeal from the district court's dismissal of their action, arguing that removal jurisdiction is lacking. We agree, and reverse.

Bayer, whose burden it is to establish removal jurisdiction, *California ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 838, *amended by* 387 F.3d 966 (9th Cir. 2004), did not show that the joint complaint obviously fails to state a cause of action under Mississippi law against resident defendants, *see McCabe v. Gen. Foods Corp.*, 811 F.2d 1336, 1339 (9th Cir. 1987) (establishing standard for fraudulent joinder). No evidence was presented to pierce the pleadings, therefore we look only to the allegations in the complaint. Assuming (without needing to decide) that Mississippi requires knowledge on the part of retailers or pharmacists, paragraphs 70, 73 and 118 of the complaint sufficiently aver it for purposes of notice pleading. Miss. R. Civ. P. 8(a). We are not obliged to follow federal district court decisions upon which Bayer relies, but in any event do not read them as controlling here given the specific allegations in Anderson's complaints.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

No basis appears in the record or in our case law for severing the claims of the eight plaintiffs who have named non-diverse defendants. Accordingly, we reverse and remand to the district court with instructions to vacate its dismissal orders and its order to file individualized complaints, as both were without jurisdiction, and to order the action, in the form it was at the time of removal, remanded to state court.

Given this disposition, it is unnecessary to reach Anderson's alternative argument that the complaints should not have been dismissed for that issue is moot.

REVERSED AND REMANDED.

EXHIBIT A

	Plaintiff Name	Case Name	State	MDL Case No.	Former Case No.
1.	Anderson, Jr., James	*James Anderson, Jr. v. Bayer Corp.* (Originally in *James E. Anderson, et al. v. Bayer Corp. et al.*)	MS	C04-1058	C04-0022
2.	Anderson, James E.	*James E. Anderson v. Bayer Corp.* (Originally in *James E. Anderson, et al. v. Bayer Corp. et al.*)	MS	C04-1449	C04-0022
3.	Anderson, John R.	*John R. Anderson v. Bayer Corp.* (Originally in *James E. Anderson, et al. v. Bayer Corp. et al.*)	MS	C04-1059	C04-0022
4.	Archer, Jack	*Jack Archer v. Bayer*	MS	C04-1060	C04-0022

	Plaintiff Name	Case Name	State	MDL Case No.	Former Case No.
		Corp. (Originally in *James E. Anderson, et al. v. Bayer Corp. et al.*)			
5.	Bailey, Dorothy	*Dorothy Bailey v. Bayer Corp. et al.* (Originally in *James E. Anderson, et al. v. Bayer Corp. et al.)*	MS	C04-1062	C04-0022
6.	Bailey, Louis	*Louis Bailey v. Bayer Corp.* (Originally in *James E. Anderson, et al. v. Bayer Corp. et al.*)	MS	C04-1061	C04-0022
7.	Barkley, Sheila	*Sheila Barkley v. Block, et al.* (Originally in *James E. Anderson, et*	MS	C04-1063	C04-0022

Plaintiff Name	Case Name	State	MDL Case No.	Former Case No.
	al. v. Bayer Corp. et al.)			
8. Bradham, Kathy	*Kathy Bradham v. Bayer Corp.* (Originally in *James E. Anderson, et al. v. Bayer Corp. et al.*)	MS	C04-1064	C04-0022
9. Butler, Eddie	*Eddie Butler v. Bayer Corp.* (Originally in *James E. Anderson, et al. v. Bayer Corp. et al.*)	MS	C04-1065	C04-0022
10. Carter, Ethel	*Ethel Carter v. Bayer Corp.* (Originally in *James E. Anderson, et al. v. Bayer Corp. et al.*)	MS	C04-1066	C04-0022
11. Dale, Ernestine	*Ernestine Dale v.*	MS	C04-1068	C04-0022

Plaintiff Name	Case Name	State	MDL Case No.	Former Case No.
	Bayer Corp. (Originally in *James E. Anderson, et al. v. Bayer Corp. et al.*)			
12. Elmore, Elizabeth	*Elizabeth Elmore v. Bayer Corp.* (Originally in *James E. Anderson, et al. v. Bayer Corp. et al.*)	MS	C04-1070	C04-0022
13. Green, Robert	*Robert Green v. Wyeth* (Originally in *James E. Anderson, et al. v. Bayer Corp. et al.*)	MS	C04-1450	C04-0022
14. Harris, Daisy	*Daisy Harris v. Bayer Corp., et al.* (Originally in *James E. Anderson, et al. v. Bayer Corp. et*	MS	C04-1048	C04-0022

Plaintiff Name	Case Name	State	MDL Case No.	Former Case No.
	al.)			
15. Henard, Leeida	*Leeida Henard v. Bayer Corp.* (Originally in *James E. Anderson, et al. v. Bayer Corp. et al.*)	MS	C04-1072	C04-0022
16. Hendry, Robert	*Robert Hendry v. AHP* (Originally in *James E. Anderson, et al. v. Bayer Corp. et al.*)	MS	C04-1073	C04-0022
17. Jacob, Dollas	*Dollas Jacob v. Bristol Myers Squibb* (Originally in *James E. Anderson, et al. v. Bayer Corp. et al.*)	MS	C04-1074	C04-0022
18. King, Ollie L.	*Ollie L. King v. Bayer Corp.* (Originally in	MS	C04-1075	C04-0022

Plaintiff Name	Case Name	State	MDL Case No.	Former Case No.
	James E. Anderson, et al. v. Bayer Corp. et al.)			
19. Lang, James	*James Lang v. Block et al.* (Originally in *James E. Anderson, et al. v. Bayer Corp. et al.*)	MS	C04-1076	C04-0022
20. Magee, William C.	*William C. Magee v. Bayer Corp.* (Originally in *James E. Anderson, et al. v. Bayer Corp. et al.*)	MS	C04-1077	C04-0022
21. Maier, Glen	*Glen and Paula Maier v. Bayer AG*	MS	C04-1451	C04-0022
22. Maier, Paula	*Glenn and Paula Maier v. Bayer AG*	MS	C04-1451	C04-0022
23. Marshall, Mildred	*Mildred Marshall v. Bayer Corp.* (Originally in	MS	C04-1034	C04-0022

Plaintiff Name	Case Name	State	MDL Case No.	Former Case No.
	James E. Anderson, et al. v. Bayer Corp. et al.)			
24. Merrick, Belain	*Belain Merrick v. Block* (Originally in *James E. Anderson, et al. v. Bayer Corp. et al.*)	MS	C04-1255	C04-0022
25. Mitchell, Valerie	*Valerie Mitchell v. Block, et al.* (Originally in *James E. Anderson, et al. v. Bayer Corp. et al.*)	MS	C04-1035	C04-0022
26. Netterville, Charles	*Charles and Melanie Netterville v. Procter & Gamble, et al.* (Originally in *James E. Anderson, et al. v.*	MS	C04-1256	C04-0022

Plaintiff Name	Case Name	State	MDL Case No.	Former Case No.
	Bayer Corp. et al.)			
27. Netterville, Melanie	*Charles and Melanie Netterville v. Procter & Gamble, et al.* (Originally in *James E. Anderson, et al. v. Bayer Corp. et al.*)	MS	C04-1256	C04-0022
28. Nickelson, Veronica	*Veronica Nickelson v. McNeil* (Originally in *James E. Anderson, et al. v. Bayer Corp. et al.*)	MS	C04-1036	C04-0022
29. Pace, LilAnn	*LilAnn Pace v. Wyeth, et al.* (Originally in *James E. Anderson, et al. v. Bayer Corp. et al.*)	MS	C04-1037	C04-0022
30. Pickering, Joy	*Joy Pickering*	MS	C04-	C04-

Plaintiff Name	Case Name	State	MDL Case No.	Former Case No.
	v. Block, et al. (Originally in *James E. Anderson, et al. v. Bayer Corp. et al.*)		1038	0022
31. Pritchard, Elizabeth	*Elizabeth Pritchard v. Wyeth* (Originally in *James E. Anderson, et al. v. Bayer Corp. et al.*)	MS	C04-1039	C04-0022
32. Schuette, Edward	*Edward Schuette v. Bayer Corp., et al.* (Originally in *James E. Anderson, et al. v. Bayer Corp. et al.)*	MS	C04-1040	C04-0022
33. Smith, Levi	*Levi Smith v. Bayer Corp.* (Originally in *James E.*	MS	C04-1041	C04-0022

Plaintiff Name	Case Name	State	MDL Case No.	Former Case No.
	Anderson, et al. v. Bayer Corp. et al.)			
34. Thompson, Willie	*Willie Thompson v. Bayer Corp.* (Originally in *James E. Anderson, et al. v. Bayer Corp. et al.*)	MS	C04-1042	C04-0022
35. Twyner, Shraon	*Sharon Twyner v. Bayer Corp., et al.* (Originally in *James E. Anderson, et al. v. Bayer Corp. et al.*)	MS	C04-1044	C04-0022
36. Vaughn, Alfanette	*Alfanette Vaughn v. GlaxoSmith Kline* (Originally in *James E. Anderson, et al. v. Bayer Corp.*	MS	C04-1346	C04-0022

Plaintiff Name	Case Name	State	MDL Case No.	Former Case No.
	et al.)			
37. Warren, Della	*Della Warren v. Bayer Corp., et al.* (Originally in *James E. Anderson, et al. v. Bayer Corp. et al.*)	MS	C04-1045	C04-0022
38. Washington, Lois	*Lois Washington v. Bayer Corp., et al.* (Originally in *James E. Anderson, et al. v. Bayer Corp. et al.*)	MS	C04-1046	C04-0022
39. Washington, Shawanda	*Shawanda Washington v. Bayer Corp.* (Originally in *James E. Anderson, et al. v. Bayer Corp. et al.)*	MS	C04-1047	C04-0022
40. Welch, Charles	*Charles Welch v. Bayer*	MS	C04-1049	C04-0022

Plaintiff Name	Case Name	State	MDL Case No.	Former Case No.
	Corp. (Originally in *James E. Anderson, et al. v. Bayer Corp. et al.*)			
41. Wells, Patricia	*Patricia Wells v. Bayer Corp. et al.* (Originally in *James E. Anderson, et al. v. Bayer Corp. et al.*)	MS	C04-1050	C04-0022
42. Wicks, Martha	*Martha Wicks v. Wyeth* (Originally in *James E. Anderson, et al. v. Bayer Corp. et al.*)	MS	C04-1051	C04-0022
43. Williams, Nathaniel	*Nathaniel Williams v. Bayer Corp.* (Originally in *James E. Anderson, et al. v. Bayer Corp.*	MS	C04-1053	C04-0022

Plaintiff Name	Case Name	State	MDL Case No.	Former Case No.
	et al.)			
44. Wilson, Roger Dale	*Roger Dale Wilson v. Bayer Corp.* (Originally in *James E. Anderson, et al. v. Bayer Corp. et al.*)	MS	C04-1054	C04-0022
45. Woods, Delores	*Delores Woods v. Bayer Corp.* (Originally in *James E. Anderson, et al. v. Bayer Corp. et al.*)	MS	C04-1055	C04-0022
46. James E. Anderson, Mildred Marshall, Valerie Mitchell, Veronica Nickelson, Lillian Pace, Joy and Judd Pickering, Elizabeth Pritchard,	*James E. Anderson, et al. v. Bayer Corp. et al.*	MS		C04-0022

Plaintiff Name	Case Name	State	MDL Case No.	Former Case No.
Edward Schuette, Levi and Marjorie Smith, Willie and Mae Thompson, Sharon Twyner, Della Warren, Lois Washington, Shawanda Washington, Daisy Harris, Charles Welch, Patricia Wells, Martha Wicks, Nathaniel and Bobbie Williams, Roger and Wilma Wilson, Delores Woods, James Anderson, John Anderson, Jack Archer, Louis and Barbara Bailey, Dorothy Bailey-Banks, Sheila				

Plaintiff Name	Case Name	State	MDL Case No.	Former Case No.
Barkley, Kathy				
Bradham, Eddie				
Butler, Ethel				
Carter, Ernestine and M. J.				
Dale, Elizabeth				
Elmore, Leeida				
Henard, Robert				
Hendry, Dollas and Eugene Jacob, Ollie				
King, James				
Lang, William and Rosie				
Magee, Belain				
Merrick, Melanie and Charles				
Netterville, Alfanette				
Vaughn, Robert				
Green, Glen and Paula Maier.				

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MDL NO. 1407

[Filed August 23, 2004]

IN RE: PHENYLPROPANOLAMINE (PPA) PRODUCTS LIABILITY LITIGATION,	)
This document relates to:	)
See Appendices A and B	)

ORDER GRANTING DEFENDANTS' JUNE 4, 2004 MOTION TO DISMISS WITH PREJUDICE FOR FAILURE COMPLY WITH CMOs 15 AND 15A

On June 4, 2004 defendant Bayer Corporation, on behalf of all defendants, filed a motion to dismiss with prejudice plaintiffs listed in Appendices A and B (among others) for failure to comply with this court's Case Management Orders (CMOs) 15 and 15A. Having reviewed the briefs filed in support of and in response to that motion, the court finds and rules as follows:

I. DISCUSSION

A. Standard For Dismissal for Failure to Comply with Court Order

As the court has discussed on previous occasions, in determining whether to dismiss a claim for failure to comply with a court order, a district court must consider five factors: (1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions. *See* May 7, 2004 Order of Dismissal With Prejudice for Failure to Comply With CMO Nos. 15 and 15A, *citing Pagtalunan v. Galaza,* 291 F.3d 639, 642 (9th Cir. 2002). Under the same analysis articulated in the May 7, 2004 order, the court finds that absent special circumstances, dismissal in these cases is warranted.

B. Whether the Original Multi-Plaintiff Complaints Listed on Appendix B Should Be Dismissed

Defendants seek dismissal of the original multi-plaintiff complaints listed on Appendix B attached hereto. Again, as this court stated in its May 7, 2004 Order, dismissal of these complaints is appropriate under CMO 15A, which provides that "after all applicable deadlines set forth in CMO 15 have elapsed, defendant may move for the dismissal of the original multi-plaintiff complaint[.]" *See* May 7, 2004 Order, *citing* CMO No. 15A, ¶3. Plaintiffs do not dispute that "all applicable deadlines" have passed, and the motion to dismiss the original multi-plaintiff complaints listed on Appendix B is granted.

Several plaintiffs appear to object to this aspect of defendants' motion, claiming that their original complaint should not be dismissed because they did, in fact, file timely individual severed complaints.[1] To clarify, dismissal of the original multi-plaintiff complaints is not a sanction, *per* se, for any "violation" of CMOs 15 or 15A. It is simply an administrative procedure the court has implemented to eliminate non-viable complaints from its docket. The court is well aware that the plaintiffs listed in footnote 1 have properly filed their individual complaints. Nevertheless, dismissal of the original multi-plaintiff complaints at this time is appropriate.

C. Other Individual Plaintiffs' Responses

Several plaintiffs have responded to defendants' motion individually. The court will address these arguments in turn.

A number of plaintiffs were erroneously included on defendants' original appendices, and this error has been brought to the court's attention by both sides; the plaintiffs are not included in this court's order.[2] A number of other objecting plaintiffs belong to cases in which a stay has been

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[1] *See* "Plaintiffs' Response in Opposition to Bayer's Motion for Dismissal With Prejudice for Cases in Which Plaintiffs Filed Untimely or No Individual Complaints Under CMOs 15 and 15A." The original multi-plaintiff complaint, *Minnie Swift, et al. v.* Bayer *Corporation, et al.*, C04-710, included plaintiffs Dorothy Bowie, Robert Davis, Curtis Deason, Eddie Gayden, Ellen Ruth Grayson, Susan Holloway, James Redmond, and Minnie Swift, all of whom subsequently filed timely individual complaints.

[2] These plaintiffs include Kathleen Kanouff, Kevin Fisher, Amy George, Geneva Benton and Viola Pitt.

entered.[3] All motions as to these cases have been stricken pursuant to the court's July 16, 2004 minute order, and both parties' arguments as to these plaintiffs are therefore moot.

Finally, a number of plaintiffs have filed essentially identical oppositions to defendants' motion, asserting a number of arguments.[4] None of these arguments are availing; indeed, one of them approaches what the court considers Rule 11 frivolity. Specifically, plaintiffs argue that since CMO 15A allows a plaintiff 30 days to cure a timely individual complaint to which a defendant has objected to as deficient, plaintiffs here are entitled to a 30-day "safe harbor" after defendants' objection (in the form of this motion) in which to file their first individual severed complaint. Almost (but unfortunately not quite) needless to say, that provision applies to timely-filed but deficient complaints, and to provide for the correction thereof, and not even arguably to complaints that were filed grossly late or not at all.

The court previously addressed the remainder of plaintiffs' arguments in its May 7, 2004 Order, and will not reiterate the analysis here. In short, the court rejects plaintiffs' assertion that dismissal is too harsh a sanction for failure to comply with the court's order. Plaintiffs filed their complaints, if at all, months late. Plaintiffs' only apparent excuse for this

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[3] These plaintiffs include Letitia Bohahan, Janet Sportsman, Gary Odom, Patsy Rawlings, Tracy Russell, and Shirley Sewell. A number of other cases listed on defendants' original appendices have also been stayed, and the motion as to these cases is stricken as well. This order does not relate to these cases, either, and they are also not included on the attached appendices.

[4] These plaintiffs include most of those listed on Appendix A.

failure is that their original multi-plaintiff complaint adequately put defendants on notice of the claims against them. Plaintiffs' assertion in this regard is extremely untimely and obviously *ad hoc*. More to the point, CMOs 15 and 15A simply did not contemplate this or any other unenumerated exception, and plaintiffs have given the court no reason to believe that such exception should be read in given the obvious prejudice suffered by defendants and the importance of proper case management to this highly complex MDL. Defendants' motion as to these plaintiffs, as listed on Appendix A, is granted.

II. CONCLUSION

Defendants' motion as to those cases listed in Appendix B is GRANTED, and these multi-plaintiff complaints are DISMISSED with prejudice in their entirety. The motion as to those cases listed in Appendix A, which includes untimely-filed individual complaints, is also GRANTED, and these cases are DISMISSED as well.

DATED at Seattle, Washington this 23rd day of August, 2004.

s/ Barbara Jacobs Rothstein
BARBARA JACOBS ROTHSTEIN
UNITED STATES DISTRICT JUDGE

See Fold-Out Exhibit

Revised Appendix A - Plaintiffs That Filed an Untimely CMO-15 Complaint

Revised Appendix A – Plaintiffs That Filed an Untimely CMO-15 Complaint

1.	Anderson, Jr.- James	*James Anderson, Jr. v. Bayer Corp.* (Originally in *James E. Anderson, et al. v. Bayer Corp., et al.*)	MS	C04-1058	C04-0022	02/11/2004	05/07/2004
2.	Anderson, James E.	*James E. Anderson v. Bayer Corp.* (Originally in *James E. Anderson, et al. v. Bayer Corp., et al.*)	MS	C04-1449	C04-0022	02/11/2004	06/23/2004
3.	Anderson- John R.	*John R. Anderson v. Bayer Corp.* (Originally in *James E. Anderson, et al. v. Bayer Corp., et al.*)	MS	C04-1059	C04-0022	02/11/2004	05/07/2004
4.	Archer- Jack	*Jack Archer v. Bayer Corp.* (Originally in *James E. Anderson, et al. v. Bayer Corp., et al.*)	MS	C04-1060	C04-0022	02/11/2004	05/07/2004
5.	Bailey- Dorothy	*Dorothy Bailey v. Bayer Corp, et al.* (Originally in *James E. Anderson, et al. v. Bayer Corp., et al.*)	MS	C04-1062	C04-0022	02/11/2004	05/07/2004
6.	Bailey- Louis	*Louis Bailey v. Bayer Corp* (Originally in *James E. Anderson, et al. v. Bayer Corp., et al.*)	MS	C04-1061	C04-0022	02/11/2004	05/07/2004
7.	Barkley- Sheila	*Sheila Barkley v. Block, et al.* (Originally in *James E. Anderson, et al. v. Bayer Corp., et al.*)	MS	C04-1063	C04-0022	02/11/2004	05/07/2004
8.	Bradham- Kathy	*Kathy Bradham v. Bayer Corp.* (Originally in *James E. Anderson, et al. v. Bayer Corp., et al.*)	MS	C04-1064	C04-0022	02/11/2004	05/07/2004
9.	Butler- Eddie	*Eddie Butler v. Bayer Corp.* (Originally in *James E. Anderson, et al. v. Bayer Corp., et al.*)	MS	C04-1065	C04-0022	02/11/2004	05/07/2004
10.	Carter- Ethel	*Ethel Carter v. Bayer Corp.* (Originally in *James E. Anderson, et al. v. Bayer*	MS	C04-1066	C04-0022	02/11/2004	05/07/2004

Revised Appendix A – Plaintiffs That Filed an Untimely CMO-15 Complaint

		Corp., et al.)					
11.	Dale-Earnestine	*Earnestine Dale v. Bayer Corp.* (Originally in *James E. Anderson, et al. v. Bayer Corp., et al.*)	MS	C04-1068	C04-0022	02/11/2004	05/07/2004
12.	Elmore-Elizabeth	*Elizabeth Elmore v. Bayer Corp.* (Originally in *James E. Anderson, et al. v. Bayer Corp., et al.*)	MS	C04-1070	C04-0022	02/11/2004	05/07/2004
13.	Gooch- Emma	*Emma Gooch v. Block* (Originally in *James E. Anderson, et al. v. Bayer Corp., et al.*)	MS	C04-1071	C04-0022	02/11/2004	05/07/2004
14.	Green – Robert	*Robert Green v. Wyeth* (Originally in *James E. Anderson, et al. v. Bayer Corp., et al.*)	MS	C04-1450	C04-0022	02/11/2004	06/23/2004
15.	Harris- Daisy	*Daisy Harris v. Bayer Corp., et al.* (Originally in *James E. Anderson, et al. v. Bayer Corp., et al.*)	MS	C04-1048	C04-0022	02/11/2004	05/07/2004
16.	Henard-Leeida	*Leeida Henard v. Bayer Corp.* (Originally in *James E. Anderson, et al. v. Bayer Corp., et al.*)	MS	C04-1072	C04-0022	02/11/2004	05/07/2004
17.	Hendry-Robert	*Robert Hendry v. AHP* (Originally in *James E. Anderson, et al. v. Bayer Corp., et al.*)	MS	C04-1073	C04-0022	02/11/2004	05/07/2004
18.	Jacob- Dollas	*Dollas Jacob v. Bristol Myers Squibb* (Originally in *James E. Anderson, et al. v. Bayer Corp., et al.*)	MS	C04-1074	C04-0022	02/11/2004	05/07/2004
19.	King- Ollie L.	*Ollie L. King v. Bayer Corp.* (Originally in *James E. Anderson, et al. v. Bayer*	MS	C04-1075	C04-0022	02/11/2004	05/07/2004

Revised Appendix A – Plaintiffs That Filed an Untimely CMO-15 Complaint

		Corp., et al.)					
20.	Lang- James	*James Lang v. Block, et al.* (Originally in *James E. Anderson, et al. v. Bayer Corp., et al.*)	MS	C04-1076	C04-0022	02/11/2004	05/07/2004
21.	Magee-Merlean	*Merlean Magee v. Elan, et al.* (Originally in *James E. Anderson, et al. v. Bayer Corp., et al.*)	MS	C04-1078	C04-0022	02/11/2004	05/07/2004
22.	Magee-William C	*William C Magee v. Bayer Corp, et al.* (Originally in *James E. Anderson, et al. v. Bayer Corp., et al.*)	MS	C04-1077	C04-0022	02/11/2004	05/07/2004
23.	Maier – Glenn	*Glenn and Paula Maier v. Bayer AG*	MS	C04-1451	C04-0022	02/11/2004	06/23/2004
24.	Maier – Paula	*Glenn and Paula Maier v. Bayer AG*	MS	C04-1451	C04-0022	02/11/2004	06/23/2004
25.	Marshall-Mildred	*Mildred Marshall v. Bayer Corp.* (Originally in *James E. Anderson, et al. v. Bayer Corp., et al.*)	MS	C04-1034	C04-0022	02/11/2004	05/07/2004
26.	Merrick – Belain	*Belain Merrick v. Block* (Originally in *James E. Anderson, et al. v. Bayer Corp., et al.*)	MS	C04-1255	C04-0022	02/11/2004	05/19/2004
27.	Mitchell-Valerie	*Valerie Mitchell v. Block, et al.* (Originally in *James E. Anderson, et al. v. Bayer Corp., et al.*)	MS	C04-1035	C04-0022	02/11/2004	05/07/2004
28.	Netterville – Charles	*Charles and Melanie Netterville v. Procter & Gamble, et al.*	MS	C04-1256	C04-0022	02/11/2004	05/19/2004
29.	Netterville – Melanie	*Charles and Melanie Netterville v. Procter & Gamble, et al.*	MS	C04-1256	C04-0022	02/11/2004	05/19/2004
30.	Nickelson-Veronica	*Veronica Nickelson v. McNeil* (Originally in *James E. Anderson, et al. v. Bayer*	MS	C04-1036	C04-0022	02/11/2004	05/07/2004

Revised Appendix A – Plaintiffs That Filed an Untimely CMO-15 Complaint

		Corp., et al.)					
31.	Pace- LilAnn	*LilAnn Pace v. Wyeth, et al.* (Originally in *James E. Anderson, et al. v. Bayer Corp., et al.*)	MS	C04-1037	C04-0022	02/11/2004	05/07/2004
32.	Pickering- Joy	*Joy Pickering v. Block, et al.* (Originally in *James E. Anderson, et al. v. Bayer Corp., et al.*)	MS	C04-1038	C04-0022	02/11/2004	05/07/2004
33.	Pritchard-Elizabeth	*Elizabeth Pritchard v. Wyeth* (Originally in *James E. Anderson, et al. v. Bayer Corp., et al.*)	MS	C04-1039	C04-0022	02/11/2004	05/07/2004
34.	Schuette-Edward	*Edward Schuette v. Bayer Corp., et al.* (Originally in *James E. Anderson, et al. v. Bayer Corp., et al.*)	MS	C04-1040	C04-0022	02/11/2004	05/07/2004
35.	Smith- Levi	*Levi Smith v. Bayer Corp.* (Originally in *James E. Anderson, et al. v. Bayer Corp., et al.*)	MS	C04-1041	C04-0022	02/11/2004	05/07/2004
36.	Thompson-Willie	*Willie Thompson v. Bayer Corp.* (Originally in *James E. Anderson, et al. v. Bayer Corp., et al.*)	MS	C04-1042	C04-0022	02/11/2004	05/07/2004
37.	Trott- Brenda	*Brenda Trott v. Wyeth, et al.* (Originally in *James E. Anderson, et al. v. Bayer Corp., et al.*)	MS	C04-1043	C04-0022	02/11/2004	05/07/2004
38.	Twyner-Sharon	*Sharon Twyner v. Bayer Corp., et al.* (Originally in *James E. Anderson, et al. v. Bayer Corp., et al.*)	MS	C04-1044	C04-0022	02/11/2004	05/07/2004
39.	Vaughn – Alfanette	*Alfanette Vaughn v. GlaxoSmithKline*	MS	C04-1346	C04-0022	02/11/2004	06/8/2004
40.	Warren- Della	*Della Warren v. Bayer Corp., et al.*	MS	C04-1045	C04-0022	02/11/2004	05/07/2004

Revised Appendix A – Plaintiffs That Filed an Untimely CMO-15 Complaint

		(Originally in *James E. Anderson, et al. v. Bayer Corp., et al.*)					
41.	Washington-Lois	*Lois Washington v. Bayer Corp., et al.* (Originally in *James E. Anderson, et al. v. Bayer Corp., et al.*)	MS	C04-1046	C04-0022	02/11/2004	05/07/2004
42.	Washington-Shawanda	*Shawanda Washington v. Bayer Corp.* (Originally in *James E. Anderson, et al. v. Bayer Corp., et al.*)	MS	C04-1047	C04-0022	02/11/2004	05/07/2004
43.	Welch-Charles	*Charles Welch v. Bayer Corp.* (Originally in *James E. Anderson, et al. v. Bayer Corp., et al.*)	MS	C04-1049	C04-0022	02/11/2004	05/07/2004
44.	Wells- Patricia	*Patricia Wells v. Bayer Corp., et al.* (Originally in *James E. Anderson, et al. v. Bayer Corp., et al.*)	MS	C04-1050	C04-0022	02/11/2004	05/07/2004
45.	Wicks- Martha	*Martha Wicks v. Wyeth* (Originally in *James E. Anderson, et al. v. Bayer Corp., et al.*)	MS	C04-1051	C04-0022	02/11/2004	05/07/2004
46.	Williams-Nathaniel	*Nathaniel Williams v. Bayer Corp.* (Originally in *James E. Anderson, et al. v. Bayer Corp., et al.*)	MS	C04-1053	C04-0022	02/11/2004	05/07/2004
47.	Wilson- Roger Dale	*Roger Dale Wilson v. Bayer Corp.* (Originally in *James E. Anderson, et al. v. Bayer Corp., et al.*)	MS	C04-1054	C04-0022	02/11/2004	05/07/2004
48.	Woods-Delores	*Delores Woods v. Bayer Corp.* (Originally in *James E. Anderson, et al. v. Bayer Corp., et al.*)	MS	C04-1055	C04-0022	02/11/2004	05/07/2004

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Revised Appendix B – List of Original Multi-Plaintiff Cases

	Case Name	State	MDL Case No.	Date Docketed
1	*Anderson, James E., et al. v. Bayer Corp., et al.*	MS	C04-0022	02/11/2004
2	*Bryant, Willey O., et al. v. Wyeth, et al.*	MS	C04-0720	04/12/2004
3	*Catchings, Sylvia et al. v. Bayer Corp., et al.*	MS	C04-0711	04/08/2004
4	*Claiborne, Maria, et al. v. GSK Consumer Health*	MS	C04-0018	02/02/2004
5	*Cowart, Elliot, et al. v. Bayer Corp., et al.*	MS	C03-2484	08/18/2003
6	*Swift, Minnie, et al. v. Bayer Corp., et al.*	MS	C04-0710	04/08/2004
7	*Thigpen, James, et al. v. Bayer Corp., et al.*	MS	C04-0019	02/04/2004

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MDL No. 1407

[Filed May 5, 2004]

IN RE: PHENYLPROPANOLAMINE (PPA) PRODUCTS LIABILITY LITIGATION,	)
This document relates to:	)
See Appendix A	)

ORDER DENYING PLAINTIFFS' MOTIONS TO REMAND

THIS MATTER comes before the Court on the motions of the plaintiffs named in Appendix A ("plaintiffs") to remand their cases to state court in Mississippi and Louisiana. The plaintiffs' complaints allege numerous claims against manufacturers of PPA-containing products, as well as in-state retail stores that sold those products (collectively, "the retail defendants"). Defendants removed these actions alleging that plaintiffs fraudulently joined the retail defendants solely to defeat diversity. Plaintiffs moved to

remand to state court. The cases have been transferred to this Court as part of multi-district litigation ("MDL") No. 1407.

I. ANALYSIS

Although plaintiffs claim that each of them has sued a non-diverse retail defendant, the facts show otherwise.

The complaints of plaintiffs Donald, Gilchrist, and Oakley are bereft of any allegations against any in-state defendants.

Plaintiff Terry alleges that he purchased a PPA-containing product at Fred's, Inc. d/b/a Fred's Discount Pharmacy ("Fred's"). Although Mr. Terry alleges that Fred's is a Mississippi corporation, defendants have presented unrebutted evidence that shows that Fred's is incorporated in Tennessee, where it maintains its corporate offices and principal place of business. *See* Affidavit of Michael R. Hodge; *see also Morris v. Princess Cruises, Inc.*, 236 F.3d 1061, 1067-68 (9th Cir. 2001) (noting that the court may consider "summary judgment-type evidence" to determine if joinder was fraudulent); 28 U.S.C. § 1332(c)(1).

Accordingly, the Court finds that plaintiffs Donald, Gilchrist, Oakley, and Terry have not brought claims against any non-diverse defendants.[1]

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[1] Plaintiffs have alleged that regardless of the citizenship of their defendants, complete diversity does not exist because they have brought their claims with other plaintiffs who have sued non-diverse defendants. This argument, however, is moot because the parties have since filed individual severed complaints by order of this Court.

Furthermore, the Court previously struck all pending motions to remand to state court and urged counsel to consider whether to re-file such motions, given the Court's denial of similar motions to remand in other cases. None of the plaintiffs listed in Appendix A to this order have presented the Court with a reason to depart from its prior rulings, and none of them have asserted valid claims against any in-state defendants.[2] A further explication of the Court's reasoning can be found in the Court's prior rulings denying similar motions to remand to state court, including *Pollard v. Bayer Corp., et al., Vick v. Novartis Corp., et al.*, and *Douglas v. Bayer Corp., et al.*

II. CONCLUSION

The Court finds that plaintiffs Donald, Gilchrist, Oakley, and Terry have not brought claims against any non-diverse defendants. The Court further concludes that the remaining plaintiffs listed in Appendix A have failed to state a cause of action against the retail defendants, and that the failure is obvious according to the settled rules of Mississippi and Louisiana. As such, the Court finds that the retail defendants were fraudulently joined and complete diversity exists among the parties. The Court therefore DENIES plaintiffs' motions to remand the cases to the state courts.

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[2] Plaintiff Watts alleges that in addition to a Mississippi retail defendant, he has sued a second non-diverse entity, Health Management Associates, Inc. d/b/a Madison County Medical Center ("MCMC"). In his operative complaint, however, Watts identifies MCMC as a Michigan corporation with its principal place of business in Florida, and despite defendants' claim of fraudulent joinder, plaintiff has not provided this Court with any evidence that MCMC is a non-diverse defendant.

DATED at Seattle, Washington this 5th day of May, 2004.

s/ Barbara Jacobs Rothstein

BARBARA JACOBS ROTHSTEIN
UNITED STATES DISTRICT JUDGE

APPENDIX A

MDL Docket Number	Plaintiff's Name
03-3032	Jessica Acevedo
04-22	James Anderson, et al
03-3459	Ira Banks
03-2732	Lessie Brown
03-2737	Renee Butler
03-2708	George and Donna Campbell
04-20	James Chasey
03-3034	Mark Chatman
03-3419	Essie Clark
03-3753	Oliver Clay
03-3522	Rose Cooper
03-2739	Emma Davis
03-3204	Kenneth Davis
03-3752	Barbara Donald
03-2734	Lucille Fells
03-2796	Sherry Gaines
03-2743	Will Gaines
03-2723	Charlotta Gardner
03-3754	Argie Gilchrist
03-2736	Mary Good
03-3206	Patricia Green aka Patricia Greene
03-2794	Samuel Hawkins
03-2797	Cherrice Jamison
03-3033	Lee Johnson
03-2738	Mae Ruth and Joseph Landers

03-2795	Byron Mabry
03-3028	Ed Magee
03-2746	Marie Moore
03-3418	George Oakley
04-16	Louise Overstreet
03-3205	Ralph Roby
04-64	Ralph Scott
04-65	Serena Scott
03-2735	Lucian and Edna Smith
03-3460	Sharon Smith
03-3417	James Terry
03-3755	Nathan Townsend
03-2745	Sara Watson Truitt
03-2740	Marilyn Walker
03-3036	Tamara Wallace
03-2844	Anderson Washington
03-539	Rudy Watts

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 04-35875
D.C. No. MD-01-01407-BJR

[Filed April 20, 2006]

In re: PHENYLPROPANOLAMINE (PPA) PRODUCTS LIABILITY LITIGATION	)
JAMES E. ANDERSON; et al.,	)
Plaintiffs - Appellants,	)
v.	)
BAYER CORPORATION; et al.,	)
Defendants - Appellees.	)

ORDER

Before: D.W. NELSON, RYMER, and FISHER, Circuit Judges.

The panel has voted to deny the petition for rehearing. Judges Rymer and Fisher have voted to deny the petition for rehearing en banc and Judge D. W. Nelson so recommends.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and petition for rehearing en banc are DENIED.

/s/_____

APPENDIX E

28 U.S.C. § 1332
§ 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $ 75,000, exclusive of interest and costs, and is between–

(1) Citizens of different States;

(c) For the purposes of this section and section 1441 of this title–

(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business; and

28 U.S.C. § 1441
§ 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original

jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

28 U.S.C. § 1446
§ 1446. Procedure for removal

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

(b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial

pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

(d) Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect removal and the State court shall proceed no further unless and until the case is remanded.

28 U.S.C. § 1447
§ 1447. Procedure after removal generally

(c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

No. 5:03cv188BRS

[Filed March 20, 2003]

JAMES E. ANDERSON, JAMES ANDERSON, JOHN R. ANDERSON, JACK ARCHER, DOROTHY BAILEY, LOUIS BAILEY and BARBARA BAILEY, SHEILA BARKLEY, KATHY BRADHAM, EDDIE BUTLER, ETHEL CARTER, ERNESTINE DALE and M.J. DALE, ELIZABETH ELMORE, EMMA GOOCH, DAISY HARRIS, LEEIDA HENARD, ROBERT HENDRY, DOLLAS JACOB and EUGENE JACOB, OLLIE KING, MERLEAN MAGEE, WILLIAM C. MAGEE and ROSIE MAGEE, BELAIN MERRICK, GLENN MAIER and PAULA MAIER, SHARON TWYNER MCKINNEY, VALERIE MITCHELL, MELANIE NETTERVILLE and CHALRES NETTERVILLE, VERONICA NICKELSON, ELIZABETH PRITCHARD, EDWARD SCHUETTE, LEVI SMITH, SR. And MARJORIE SMITH, WILLIE THOMPSON, and MAY THOMPSON, BRENDA TROTT, ALFANETTE VAUGHN, DELLA WARREN, LOIS WASHINGTON, SHAWANDA WASHINGTON, CHARLES WELCH, PATRICIA WELLS, MARTHA WICKS, NATHANIEL	)

WILLIAMS and BOBBIE WILLIAMS, ROGER DALE WILSON and WILMA DIANE WILSON, DELORES WOODS, ROBERT GREEN, ILA ANN PACE, JOY PICKERING and JUDD PICKERING, GWENDOLYN SIMPSON, JAMES LAND AND MILDRED MARSHALL)

PLAINTIFFS)

vs.)

BAYER CORPORATION, A SUBSIDIARY OF BAYER A.G., SMITHKLINE BEECHAM CORP,; A SUBSIDIARY OF SMITHKLINE BECHAM HOLDINGS CORP.; GLAXOSMITHKLINE, INC.; GLAXOSMITHKLINE LLC; GLAXOSMITHKLINE CONSUMER HEALTHCARE LLP; GLAXOSMITHKLINE CONSUMER HEALTHCARE; BRISTOL-MYERS SQUIBB COMPANY; WYETH f/k/a AMERICAN HOME PRODUCTS CORP; BLOCK DRUG COMPANY, INC.; BLOCK DRUG CORPORATION; WAL-MART STORES, INC; WAL-MART STORES EAST, LP; WAL-MART STORES EAST, INC.; MCNEIL CONSUMER HEALTHCARE CO., a/k/a MCNEIL CONSUMER PRODUCTS CO., A SUBSIDIARY OF JOHNSON & JOHNSON CONSUMER COMPANIES, INC.; PROCTER AND GAMBLE PHARMACEUTICALS, INC; A SUBSIDIARY OF THE PROCTER AND GAMBLE COMPANY, INC.; THE PROCTER AND GAMBLE COMPANY; WELPHARM INC; ELAN PHARMACEUTICALS, INC.; AMERISOURCE BERGAN F/K/A AMERISOURCE HEALTH SERVICES D/B/A AMERICAN HEALTH)

PACKAGING AH; K & B SERVICES INC; SUPERMARKET OPERATIONS INC., D/B/A NATCHEZ MARKET; FRED'S OF TENNESSEE, INC.; A SUBSIDIARY OF FRED'S INC. A/k/a FRED'S, FRED'S EXPRESS, FRED'S DISCOUNT AND FRED'S PHARMACY; FRED'S OF NATCHEZ, INC.; D/B/A FRED'S JOHN DOE d/b/a COUNTY MARKET; JOHN DOE d/b/a DOWN'S VIDEO; KMART OF MICHIGAN, INC.; A SUBSIDIARY OF KMART CORP.; BRELAND DRUG COMPANY, INC. D/b/a BRUMFIELD'S DRUG STORE; LIBERTY DRUG STORE,; INC., STEPHEN L. LAFRANCE PHARMACY, INC., D/b/a SUPER D DRUGS; RITE-AID HEADQUARTERS CORP, RITE-AID PHARMACIES; WALCO OIL COMPANY, INC., d/b/a WALCO MART; JOHN DOE #1 AND JOHN DOE #2

DEFENDANTS

NOTICE OF REMOVAL

IN ACCORDANCE WITH 28 U.S.C. §§ 1441 & 1446, you are hereby notified that Defendant Bayer Corporation has removed this civil action from the Circuit Court of Wilkinson County, Mississippi, to the United States District Court for the Southern District of Mississippi, Western Division, and in support thereof would show unto the Court the following:

I.

This action was originally filed in the Circuit Court of Wilkinson County, Mississippi, as Civil Action No.02-0187.

II.

The United States District Court for the Southern District of Mississippi, Western Division, had, at the time the suit was filed, and now has, original subject matter jurisdiction of this civil action because there is complete diversity of citizenship among all properly joined parties, pursuant to 28 U.S.C. § 1332. The Complaint was filed by James E. Anderson, James Anderson, John R. Anderson, Jack Archer, Dorothy Bailey, Louisa Bailey and Barbara Bailey, Sheila Barkely, Kathy Bradham, Eddie Butler, Ethel Carter, Ernestine Dale and M.J. Dale, Elizabeth Elmore, Emma Gooch, Daisy Harris, Leeida Henard, Robert Hendry, Dollas Jacob, and Eugene Jacob, Ollie L. King, Merlean Magee, William C. Magee and Rosie Magee, Belain Merrick, Glenn Maier and Paula Maier, Sharon Twyner McKinney, Valerie Mitchell, Melanie Netterville and Charles Netterville, Veronica Nickelson, Elizabeth Pritchard, Edward Scheutte, Levi Smith, Sr. And Marjorie Smith, Willie Thompson and May Thompson, Brenda Trott, Alfanette Vaughn, Della Warren, Lois Washington, Shawanda Washington, Charles Welch, Patricia Wells, Martha Wicks, Nathaniel Williams and Bobbie Williams, Roger Dale Wilson and Wilma Diane Wilson, Delores Woods, Robert Green, Lil Ann Pace, Joy Pickering, and Judd Pickering, Gwendolyn Simpson, James Lang, and Mildred Marshall against defendants Bayer Corporation a subsidiary of Bayer A.G., SmithKline Beecham Corp., a subsidiary of SmithKline Beecham Holdings Corp., GlaxoSmithKline Inc., GlaxoSmithKline LLC., GlaxoSmithKline Consumer Healthcare LLP.,

GlaxoSmithKlline Consumer Healthcare, Bristol-Myers Squibb Company, Wyeth f/k/a American Home Products Corp., Block Drug Company, Inc., Block Drug Corporation, Wal-Mart Stores, Inc., Wal-Mart Stores East, LP., Wal-Mart Stores East, Inc., McNeil Consumer HealthCare Co., a/k/a McNeil Consumer Products Co., A subsidiary of Johnson & Johnson Consumer Companies, Inc., Proctor and Gamble Pharmaceuticals, Inc., a subsidiary of The Procter and Gamble Company, Inc., The Proctor and Gamble Company, Welpharm Inc., Elan Pharmaceuticals, Inc., Amerisource Bergan f/k/a Amerisource HealthServices d/b/a American Health Packaging AH., K & B Services, inc., Supermarket Operations, Inc., d/b/a Natchez Market, Fred's of Tennessee, Inc., a subsidiary of Fred's Inc., a/k/a Fred's, Fred's Xpress, Fred's Discount and Fred's Pharmacy, Fred's of Natchez, Inc., d/b/a Fred's John Doe d/b/a County Market, John Doe d/b/a Down's Video. Kmart of Michigan, Inc., a subsidiary of Kmart Corporation, Breland Drug Company, Inc., Brumfield's Drug Store, Liberty Drug Store, Inc., Stephen L. LaFrance Pharmacy, Inc., d/b/a Super D Drugs, Rite-Aid Headquarters Corp., d/b/a Rite-Aid Pharmacies, Walco Oil Company, Inc. D/b/a Walco. The amount in controversy in this civil action, exclusive of interest and costs, exceeds the sum of $75,000, as set forth in Plaintiffs' Complaint at paragraph 77. No party properly joined as a defendant is a citizen of the State of Mississippi, the state in which this action was brought. This action may be removed to this Court pursuant to 28 U.S.C. § 1441.

III.

According to the allegations of the Complaint, the following plaintiffs are all Mississippi resident citizens: James E. Anderson, James Anderson, John R. Anderson, Jack Archer, Dorothy Bailey, Louisa Bailey and Barbara

Bailey, Sheila Barkely, Kathy Bradham, Eddie Butler, Ethel Carter, Ernestine Dale and M.J. Dale, Elizabeth Elmore, Emma Gooch, Daisy Harris, Leeida Henard, Robert Hendry, Dollas Jacob, and Eugene Jacob, Ollie L. King, Merlean Magee, William C. Magee and Rosie Magee, Belain Merrick, Glenn Maier and Paula Maier, Sharon Twyner McKinney, Valerie Mitchell, Melanie Netterville and Charles Netterville, Veronica Nickelson, Elizabeth Pritchard, Edward Scheutte, Levi Smith, Sr. and Marjorie Smith, Willie Thompson and May Thompson, Brenda Trott, Alfanette Vaughn, Della Warren, Lois Washington, Shawanda Washington, Charles Welch, Patricia Wells, Martha Wicks, Nathaniel Williams and Bobbie Williams, Roger Dale Wilson and Wilma Diane Wilson, Delores Woods, Robert Green, Lil Ann Pace, Joy Pickering, and Judd Pickering, Gwendolyn Simpson, James Lang, and Mildred Marshall. Defendant Bayer Corporation is now and was at the time of filing a corporation organized under the laws of Indiana with its principal place of business in Pennsylvania. Defendant SmithKline Beecham Corp., a subsidiary of SmithKline Beecham Holdings, Corp., is now, and was at the time of filing, a corporation organized under the laws of the State of Pennsylvania with its principal place of business in Pennsylvania, and therefore is a citizen of Pennsylvania. Defendant GlaxoSmithKline, Inc. is an unknown entity and upon information and belief there is no such entity as GlaxoSmithKline, Inc. Defendant GlaxoSmithKline, LLC is an unknown entity and upon information and belief there is no such entity as GlaxoSmithKline, LLC. Defendant GlaxoSmithKline Consumer Healthcare, LP (also erroneously named herein as GlaxoSmithKline Consumer Healthcare) is now and was at the time of filing a Delaware limited partnership with its principal place of business in Pennsylvania and is a citizen of Delaware, New Jersey and Pennsylvania for federal jurisdiction purposes. Bristol-Myers

Squibb Company is now, and was at the time of filing, a corporation organized under the laws of the State of Delaware with its principal place of business in New York, and therefore is a citizen of Delaware and New York. Wyeth f/k/a American Home Products Corp., is now and was at the time of filing a corporation organized under the laws of Delaware with its principal place of business in New Jersey and therefore is a citizen of Delaware and New Jersey. Defendant Wyeth Ayerst is now and was at the time of filing a corporation organized under the laws of Delaware with its principal place of business in New Jersey and therefore is a citizen of Delaware and New Jersey. Defendant Block Drug Company, Inc. is now and was at the time of filing a corporation organized under the laws of New Jersey with its principal place of business in New Jersey. Defendant Block Drug Corporation is now and was at the time of filing a corporation organized under the laws of New Jersey with its principal place of business in New Jersey. Defendant Wal-Mart Stores, Inc. is now and was at the time of filing a corporation organized under the laws of Delaware with its principal place of business in Arkansas. Defendant Wal-Mart Stores East, LP. is now and was at the time of filing a limited partnership organized under the laws of Delaware with its principal place of business in Arkansas. Defendant Wal-Mart Stores East, Inc. is now and was at the time of filing a corporation organized under the laws of Arkansas with its principal place of business in Arkansas. McNeil Consumer Healthcare Co., a/k/a McNeil Consumer Products Co., a subsidiary of Johnson & Johnson Consumer Companies, Inc., upon information and belief and according to the complaint is now and was at the time of filing a corporation organized under the laws of New Jersey with its principal place of business in Pennsylvania. Defendant Procter and Gamble Pharmaceuticals, Inc., a subsidiary of Procter and Gamble Company, Inc., is now and was at the

time of filing a corporation organized under the laws of Ohio with its principal place of business in Ohio. Defendant Welpharm Inc., upon information and belief is now and was at the time of filing a corporation organized under the laws of California with its principal place of business in California. Defendant Elan Pharmaceuticals Inc., is now and was at the time of filing a corporation organized under the laws of Delaware with its principal place of business in California. Defendant Amerisource Bergan f/k/a Amerisource HealthServices d/b/a American Health Packaging AH, upon information and belief is now and was at the time of filing a corporation organized under the laws of Ohio with it s principal place of business in Ohio. Defendant K&B Services, Inc is now and was at the time of filing a corporation organized under the laws of Louisiana with its principal place of business in Louisiana. Defendant Fred's Stores of Tennessee, Inc.(erroneously sued as Fred's of Tennessee, Inc., a subsidiary of Fred's Inc. a/k/a Fred's, Fred's Xpress, Fred's Discount and Fred's Pharmacy) is now and was at the time of filing a corporation organized under the laws of Tennessee with its principal place of business in Tennessee. Defendant Fred's of Natchez, Inc. d/b/a Fred's is an unknown entity and upon information and belief there is no such entity as Fred's of Natchez, Inc. Defendant Stephen L. LaFrance Pharmacy, Inc. d/b/a Super D Drugs is now and was at the time of filing a corporation organized under the laws of Arkansas with its principal place of business in Arkansas. Defendant Kmart of Michigan, Inc. is now and was at the time of filing a corporation organized under the laws of Michigan with its principal place of business in Michigan, however it is in bankruptcy having filed its petition January 22, 2002, in the Bankruptcy Court for the Northern District of Illinois. Defendant Supermarket Operations, Inc., d/b/a Natchez Market is now and was at the time of filing a corporation organized under the laws of

Louisiana with its principal place of business in Mississippi and therefore is a resident citizen of Louisiana and Mississippi, but it has been fraudulently joined. Defendant John Doe d/b/a Down's Video is an unknown entity, but if it is a Mississippi resident citizen it has been fraudulently joined. Defendant Breland Drug Company, Inc. d/b/a Brumfield's Drug Store is now and was at the time of filing a corporation organized under the laws of Mississippi with its principal place of business in Mississippi, but it has been fraudulently joined. Defendant Liberty Drug Store, Inc. is now and was at the time of filing a corporation organized under the laws of Mississippi with its principal place of business in Mississippi, but it has been fraudulently joined. Defendant Walco Oil Company, Inc. d/b/a Walco Mart is now and was at the time of filing a corporation organized under the laws of Mississippi with its principal place of business in Mississippi, but it has been fraudulently joined. Plaintiffs have also named two "John Doe" defendants however, for purposes of removal their citizenship is disregarded. Defendants Supermarket Operations Inc., Breland Drug Company, Inc., Liberty Drug Store, Inc., and Walco Oil Company, Inc. are hereinater collectively referred to as the "Mississippi Retailer Defendants." There is complete diversity of citizenship between all properly joined plaintiffs and all properly joined defendants.

IV.

The plaintiffs have fraudulently joined the Mississippi Retailer Defendants because as to them the Complaint fails to state a claim upon which relief can be granted and with respect to which plaintiffs have a possibility of recovery, for the following reasons:

(a) The Complaint does not allege facts constituting any cause of action against the Mississippi Retailer Defendants. Under the alleged facts, the Mississippi Retailer Defendants had no duty to warn plaintiffs regarding the subject medicines which contained PPA, and no liability otherwise. Plaintiffs fail to state a claim against the Mississippi Retailer Defendants under any count and under the allegations there is no reasonable basis to predict that the plaintiffs can establish, that the Mississippi Retailer Defendants had or should have had knowledge of the alleged dangers of the subject medicines which contained PPA.

(b) Plaintiffs cannot recover from the Mississippi Retailer Defendants on a breach of warranty theory because plaintiffs gave no notice to the Mississippi Retailer Defendants of any breach before the institution of this suit.

(c) To the extent the Complaint purports to assert a claim of fraud against the Mississippi Retailer Defendants the Complaint does not comply with Mississippi and Federal Rules of Civil Procedure requiring averments of fraud to be stated with particularity and accordingly fails to state a claim for fraud upon which relief may be granted. Miss. R. Civ. P. 9(b); Fed. R. Civ. P. 9(b).

(d) Bayer refers to the opinion and orders denying remand, filed November 27, 2002, in *Barnett, et al. v. American Home Products Corp., et al.*, No. C02-423R, In Re: Phenylpropanolamine (PPA) Products Liability Litigation (MDL No. 1407), U.S. Dist. Ct. for the W. D. Wash., and in eight other cases transferred from federal courts in Mississippi to MDL No. 1407.

(e) Plaintiffs failed to allege a date of exposure or injury. To the extent plaintiffs' claims are barred by the applicable

statute of limitations, plaintiffs have no possibility of recovery against the Mississippi Retailer Defendants.

(f) K-Mart of Michigan Inc. filed a petition in bankruptcy on January 22, 2002 and therefore has also been fraudulently or improperly joined as a defendant in this action in violation of the automatic stay for the sole purpose or with the effect of defeating removal of this action to the United States District for the Southern District of Mississippi. Plaintiffs' attempt to join K-Mart in this action is invalid and in violation of the automatic stay. *See* 11 U.S.C. § 362.

Accordingly, there is no reasonable basis to predict that the plaintiffs might establish liability against the Mississippi Retailer Defendants and they are fraudulently joined.[1]

V.

Plaintiffs have attempted to defeat the diversity jurisdiction of this Court through improper joinder of parties. The plaintiffs are improperly joined and have fraudulently and improperly joined the non-diverse defendants. One or more plaintiffs allege no factual connection with a non-diverse defendant and have no claim against a non-diverse defendant, yet all plaintiffs purport to assert claims and seek

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[1] Alternatively, to the extent that the diverse defendants may be found to be non-diverse, it is also asserted that the diverse retailer defendants have been fraudulently joined for the same reasons set forth in paragraph IV. The diverse retailer defendants are Wal-Mart Stores, Inc., Wal-Mart Stores East, LP, Wal-Mart Stores East, Inc., K & B Services, Inc., Fred's Stores of Tennessee, Inc., Kmart of Michigan, Inc., Stephen L. LaFrance Pharmacy, Inc., and Rite-Aid Headquarters Corp.

recovery from all defendants in order to attempt to destroy diversity jurisdiction. Even if one or more plaintiffs has a claim against a non-diverse defendant, which is denied, such plaintiff(s) are improperly joined with plaintiff(s) who have claims only against diverse defendants. The plaintiffs' claims do not arise out of the same transaction or occurrence and there is no common question of law or fact.

VI.

This Notice of Removal is filed prior to thirty days after the first receipt through service by any defendant of a copy of the initial pleading setting forth the claim for relief upon which this action is based.

VII.

All defendants required to consent to removal have consented to this removal. Said consents are either attached hereto as Exhibit "C" are filed separately with the Clerk.

VIII.

Pursuant to 28 U.S.C. § 1446(a), a copy of all process, pleadings and orders received by this removing defendant is attached hereto as Exhibit "A."

IX.

On August 28, 2001, the Judicial Panel on Multi-District Litigation ("the Panel") issued an Order establishing an MDL in the United States District Court for the Western District of Washington for all PPA lawsuits pending in the federal courts. A copy of the Order is attached hereto as Exhibit "B." Defendant Bayer intends to notify the Panel that

this action is a "tag-along" case that should be transferred to the MDL proceeding.

RESPECTFULLY SUBMITTED this 20th day of March, 2003.

BAYER CORPORATION
By Its Attorneys
WATKINS & EAGER, PLLC

By: /s/
C. Joyce Hall

OF COUNSEL:

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